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CHARLES ELMORE
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,

Petitioner,

vs.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, TREASURY DEPARTMENT; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND D. W. GRIFFIN, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

**PETITION FOR A REHEARING OF PETITION FOR
WRIT OF CERTIORARI**

WALTER BROWER,
Counsel for Petitioner.

WALTER BROWER,
COLEMAN GANDEL,
Of Counsel.

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**PETITION FOR A REHEARING OF PETITION FOR
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*To the Honorable Harlan F. Stone, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:*

The petitioner, Thomas J. Molloy & Co., Inc., respectfully prays for a rehearing of its petition for a writ of certiorari heretofore filed and denied by this Court on January 29th, 1945.

1. Petitioner deems it necessary to ask for a rehearing for the reason that respondents' brief in opposition entirely

avoided the legal questions presented by petitioner and the alleged errors in the decision of the Circuit Court of Appeals but rests entirely on a basis and theory not asserted in the Administrator's proceedings and which the Circuit Court of Appeals completely rejected.

2. The petitioner is further impelled to ask for a rehearing of its petition for a writ because the respondents have failed entirely to answer or even argue against the validity of the pertinent contentions urged by petitioner in the Circuit Court of Appeals or in its petition submitted to this Court, although the questions raised by the petitioner in its petition for a writ are basic and fundamental to the construction and administration of the Federal Alcohol Administration Act (27 U. S. C. 201 etc., 49 Stat. 977).

3. Despite the fact that petitioner's basic permit was annulled under Section 4 (e)(3) of the Federal Alcohol Administration Act on the alleged ground of misrepresentation of *material facts* in connection with the application for the permit in question, respondents have failed since to justify the annulment on that ground but have cited cases to the Circuit Court of Appeals and later to this Court which involve criminal prosecutions under unrelated statutes in which materiality of representation is not a prerequisite to guilt or responsibility, as it is under Section 4 (e) (3) of the Act.

4. Respondents cited the same cases to and presented the same argument of this matter before the United States Circuit Court of Appeals and evoked from the presiding judge there the comment that the argument was not sound and the cases cited not material.

5. The respondents' hearing officer stated in his report and findings as basis for the annulment recommended, that the principal issue is whether the permit was procured

through fraud or misrepresentation or concealment of *material facts* (R. 905).

6. Unless the alleged, false statements were material, they may not be the basis of an annulment proceedings under Section 4 (e)(3). These statements may not be deemed to have been material unless the information was requisite to the issuance of a permit under the Statute. Only a judicial statutory construction can determine this particularly in the light of the contention that the Administrator has exercised discretionary powers which neither the Statute nor the Legislative history thereof purports to invest in him.

7. Despite the basic questions raised by the petitioner in the proceedings in the Circuit Court of Appeals and the subsequent petition filed herein, involving questions of construction of the statute and the respondents' powers thereunder, an answer to or discussion of petitioner's contentions have been significantly avoided by respondents.

8. Respondents have chosen to resist petitioner's proceedings in the Circuit Court of Appeals and the petition for writ in this Court on the entirely irrelevant point of estoppel, notwithstanding the fact that Section 4(e)(3) of the Federal Alcohol Administration Act under which petitioner's permit was annulled requires as the basis of such action a misrepresentation of *material facts*, and contains the full extent of penalty to be inflicted upon those within its purview.

9. The questions presented by the petitioner are vital not alone to it but a construction of the Statute and the extent of the Administrator's powers thereunder are of tremendous importance to an immense industry throughout the land. This Court has never ruled on the subject nor have

the respondents hazarded argument in justification of their construction of the Statute in question.

10. It is respectfully submitted that respondents' complete avoidance of the issues so raised in this as well as in the Circuit Court, calls for an expression by this Court on the questions presented in the petition for a writ as they affect the rights of petitioner and all others affected by the administration of the Federal Alcohol Administration Act.

WHEREFORE, petitioner respectfully prays that a rehearing of its petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted, and that upon such rehearing the petition be granted and a writ as therein prayed for be issued.

THOMAS J. MOLLOY & Co., INC.,
By WALTER BROWER,
Attorney for Petitioner.

WALTER BROWER,
COLEMAN GANGEL,
Of Counsel.

Certificate

I, Walter Brower, of counsel for the petitioner, hereby certify that the foregoing petition is submitted in good faith and not for the purpose of delay.

WALTER BROWER.

